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**PROJECT NO. 51830**

<b>REVIEW OF CERTAIN RETAIL</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>ELECTRIC CUSTOMER</b>	<b>§</b>	
<b>PROTECTION RULES</b>	<b>§</b>	<b>OF TEXAS</b>

**OFFICE OF PUBLIC UTILITY COUNSEL’S INITIAL COMMENTS  
ON COMMISSION’S PROPOSAL FOR PUBLICATION**

The Office of Public Utility Counsel (“OPUC”) respectfully submits these initial comments on the Proposal for Publication approved by the Public Utility Commission of Texas (“Commission”) on July 29, 2021. The Commission’s Proposal for Publication proposes amendments to existing 16 Texas Administrative Code (TAC) §25.43, 25.471, 25.475, 25.479, and 25.498.<sup>1</sup> The Commission also proposes new 16 TAC §25.499, relating to Acknowledgement of Risk Requirements for Certain Commercial Contracts.<sup>2</sup> The proposed rules implement Texas Utilities Code § 17.003(d-1)(c) enacted by the 87<sup>th</sup> Texas Legislature requiring electric utilities and retail electric providers to periodically provide to customers information concerning load shed, type of customers and procedure to be considered for critical care or critical load, and reducing electricity use at times when involuntary load shed events may be implemented.<sup>3</sup> The proposed rules will prohibit the offering of wholesale indexed products to residential or small commercial customers and require customers other than residential or small commercial customers to sign an acknowledgement of risk prior to enrolling in any indexed products or products that contain a separate assessment for ancillary service charges.<sup>4</sup>

The Proposal for Publication requests initial comments on the proposed rule by August 27, 2021. These comments are timely filed.

OPUC’s comments make the following recommendations to the Proposed Rule:

1. Add a safety threshold to prevent the energy charge from increasing too substantially year over year;

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<sup>1</sup> Proposal for Publication at 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

2. Require the safety threshold to be the lesser of the Large Service Provider (“LSP”) formula or 20% for residential customers and 25% for small commercial customers;
3. Prohibit contracts with ancillary service pass through charges for residential and small commercial customers; and
4. Prohibit indexed products for residential and small commercial customers.

## **I. RESPONSES TO COMMISSION QUESTIONS ON THE PROPOSED RULE**

The Proposal for Publication requested comment on the following questions:

1. *Should the maximum rate for provider of last resort service that is charged by a large service provider to a residential customer in proposed §25.43 (m)(2)(A)(iii) and small and medium non-residential customers in proposed §25.43 (m)(2)(B)(iv) include a safety threshold to prevent the energy charge from increasing by more than a certain percentage on a year-to-year basis? If so, what is an appropriate safety threshold?*

OPUC believes that the maximum rate for Provider of Last Resort Service (“POLR”) should include a safety threshold to prevent the energy charge from increasing by more than a certain percentage on a year-to-year basis for residential and small non-residential customers. OPUC proposes that the limitation should be the lesser of the formula outcome or 20% for residential consumers and 25% for non-residential customers. The current rule already contemplates a 20% increase over average Real-Time Settlement Point Prices (“RTSPP”) for residential consumers and 25% for non-residential customers through the formula.<sup>5</sup> In line with those increases, OPUC believes it is fair and appropriate to limit any potential rate shock to consumers to the lesser of the LSP formula outcome overall, or a simple 20% increase over previous rates for residential customers and 25% for the small non-residential customers.

Consumers currently paying below the average RTSPP for their area will benefit from the overall cap and have their rate shock limited to a flat 20% or 25% increase over their current rates. Consumers currently paying over the average RTSPP will benefit from the formula approach, which would yield a price under their current price.

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<sup>5</sup> See 16 TAC §25.43(m)(2)(A)(iii). See also 16 TAC §25.43(m)(2)(B)(iv).

2. *Do the acknowledgement of risk requirements in proposed 25.475 (c)(3)(G) and 25.475 (j) provide adequate customer protections for residential and small commercial customers that enroll in indexed retail electric products and retail electric products that allow for the pass-through of ancillary service charges? If not, should these products be prohibited for residential and small commercial customers?*

The provisions in the proposed §25.475 (c)(3)(G) and §25.475 (j) require a customer to sign an Acknowledgment of Risk (“AOR”) verifying that the customer accepts the potential price risks associated with the product. For an indexed product, the AOR must state that the product is indexed, and that the rate may change for reasons beyond the customer’s control, which may result in unexpectedly high bills, potentially significantly higher than previous bills. For a product containing a separate assessment of ancillary services, the AOR must state that the rate can vary for reasons beyond the customer’s control and may result in unexpectedly high bills. The customer must also state that it understands the risks involved with the plan. OPUC does not believe that signing these waivers is enough to protect residential and small commercial consumers and recommends that the Commission prohibit indexed products and contracts containing ancillary service pass through charges for residential and small commercial customers.

Residential and small commercial customers are frequently required to sign waivers. They must acknowledge multiple pages of items for software updates, phone updates, and credit card terms and conditions changes. They must sign waivers to join a gym, for their children to play sports, to rent a car or book a hotel room. Waivers have become so common place and usually benign that customers rarely read the waiver forms, and if they do read them, they are not very likely to comprehend what they are signing. Simply having residential and small commercial customers sign a waiver that says they understand the content of the waiver, does not mean that they *actually* understand what they are signing.

Secondly, products that contain separate ancillary services pass through charges also require this waiver. Contracts with ancillary service pass through charges are akin to contracts linked to the wholesale market. In fact, ancillary service prices were higher during Winter Storm Uri than actual prices for energy (which were capped at \$9,000/ MWh). While ancillary service prices may be capped along with energy prices in the future, they can still vary by extreme

amounts. Therefore, ancillary service pass through charges should be prohibited for residential and small commercial customers just as other products tied to the wholesale market are prohibited.

Finally, indexed products can be indexed to a variety of things. While some may not vary significantly, others can and do vary significantly. One example of an indexed product is one indexed to the price of natural gas. When gas prices are stable, it might not be harmful to customers to be indexed to gas prices. However, as we saw during Winter Storm Uri, gas prices can become extremely high during shortages. One lawsuit stemming from Winter Storm Uri alleges that gas prices rose up to 15,000%.<sup>6</sup> Most customers are not able to handle prices that can swing that much. Additionally, most professionals working in the electricity or oil and gas industries could not have predicted prices that variable. If professionals failed to predict prices that high, customers signing a waiver cannot be expected to predict or comprehend the resulting rate increase possibilities. It is not enough to have customers sign a waiver. OPUC believes that all indexed products should be prohibited for residential and small commercial customers.

## **II. COMMENTS ON REVISIONS TO 16 TAC § 25.471, § 25.498, and § 25.499**

OPUC raised various concerns regarding some of these provisions in the Strawman phase of this rulemaking.<sup>7</sup> OPUC believes that those concerns have been adequately addressed in the proposal for publication.

## **III. CONCLUSION**

OPUC appreciates the opportunity to provide these initial comments on the Proposal for Publication and looks forward to working with Commission Staff and other stakeholders in this project.

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<sup>6</sup> *CPS Energy vs. Houston Pipe Line Company, LP and Oasis Pipeline, LP*, No. 2021CI05138 at 1 (407th Dist. Ct., Bexar County, Tex., Mar. 19, 2021).

<sup>7</sup> OPUC Strawman Comments (Jul. 6, 2021).

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